DUE PROCESS HEARING PANEL
STATE OF MISSOURI

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	)
Parents,	)
	)
vs.	)
	)
St. Louis Public Schools,	)
	)
Respondent.	)

ST. LOUIS PUBLIC SCHOOLS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Petitioner, Child, is a student with disabilities born on. He displays gross motor, fine motor, and oral motor difficulties.[1] TR 83. Child lives at home with Parents, and three older sisters. Jt. Ex. B1

2. When Child was a young child, he had serious delays in his developmental milestones including walking, crawling, and speaking. TR 171-172. He participated in the First Steps Program. TR 172; Jt. Ex. B1.

3. Child was evaluated initially and had his first Individual Education Program ("IEP") developed by the St. Louis Public Schools (the "District") in December 1995 when he was years old. At that time, services were provided for Child by the Early Childhood Special Education ("ECSE"). Child attended ECSE programs in self-contained classrooms at Gallaudet and Kottmeyer Early Childhood Center for two years. While attending ECSE, Child progressed in various areas. His progress was communicated to Parents both orally and by letter. Jt. Ex. A10.

[1] The Hearing Transcripts are identified as TR ___. Witness Depositions are identified as Dep. ___. Joint Exhibits are identified as Jt. Ex. ___.

4. Child has attended Lyon School throughout his elementary education. At the time of the hearing, he was in second grade in a regular education classroom with special education aides and services as agreed upon by Parents and the district staff in IEP's. TR 82
5. Child's mother is employed as a parent liaison at . TR 82. She works in the building 20 to 30 hours a week. She has been involved with for many years, both as a parent (Child's siblings attended) and as an employee. TR 82-83.
6. In the fall of 1998, Child's mother, told Ms. Mabel Brown, the District's Speech and Language Supervisor, that her son was not receiving the correct amount of speech services from Ms. Elaine Dorsey. TR 95-96. Ms. Brown investigated the situation. TR 780. When Ms. Brown discovered that the Speech and Language Pathologist had not been performing as specified on Child's IEP. TR 780, she directed Ms. Dorsey to hold an IEP meeting to address compensatory time. TR 780. About a week later, when Ms. Brown learned that Ms. Dorsey had not resolved matters at a December 17, 1998 IEP meeting, Ms. Brown asked her to set up another IEP meeting, which was held on February 10, 1999. TR 99; TR 781. A notice of the meeting was given to Child's mother, however the purpose was not delineated on the notice. Ms. Dorsey resigned on February 8, 1999. TR 784. An IEP meeting was held on 2/10/99 without Mrs. Dorsey.
7. Child's mother attended the February 10, 1999 meeting. TR 175-176. This meeting lasted over four hours. Child's present level of performance and previous goals were discussed. TR 697. All IEP participants communicated about Child's needs and difficulties at this IEP meeting. TR 698-699. Both Child's classroom teacher, Ms. Diane Carmen, and Child's mother stated that Child was making progress in the

general education curriculum. TR 176-177. Ms. Carmen and Child's other providers had input and described Child's progress. TR 176-177. Child's various goals were identified and discussed. TR 177. Child's mother testified that Child progressed in each of the 7 goals in his IEP. TR 399-400. Ms. Brown and Mr. Gary Sandretto, CCC, SLP, were speech and language representatives from the District and served as speech and language technical advisors. No speech and language therapist who had direct contact with Child was present in the meeting. TR 784; TR 696. Each of them asked many questions of Child's mother and Ms. Carmen to determine Child's level of performance and to determine what goals were appropriate. TR 400-401; TR 786. See Jt. Ex. A6.

8. At the February 10, 1999 IEP meeting, Ms. Brown agreed that Child should be provided with compensatory minutes for speech services that were not provided from Ms. Dorsey. Although Ms. Dorsey provided therapy to Child, she left no documentation of the number of minutes she had provided. TR 403; TR 706. For this reason, Ms. Brown asked Child's mother to state the number of compensatory minutes that she believed Child needed. TR 403; TR 788. The amount of compensatory time Parents requested was written into the February 10, 1999 IEP. TR 403; Jt. Ex. A6. A total of 1440 compensatory minutes were included (40 minutes a week for 36 weeks). TR 804; Jt. Ex. A6. However, the District also acknowledged that the compensatory time would continue to increase until a new speech and language pathologist was hired. TR 804; Jt. Ex A6.
9. Child's father faxed a letter to Mrs. Brown, the day after this February 10, 1999 meeting, expressing his concerns about the decisions made at the IEP meeting

followed by a letter to Dr. Hammond, the superintendent, stating that they were not in agreement with the February 10, 1999 IEP.

10. Ms. Gretchen Zinschlag was Child's speech pathologist beginning about March of 1999 and during ESY that summer. TR181. Ms. Zinschlag has a bachelor's degree in Speech Pathology and Audiology from Northern Illinois University and a Master's Degree in Speech Pathology from Northern Illinois University. TR 635.

11. A diagnostic staffing was held June 2, 1999 followed by an IEP meeting. Jt. Ex. A5; TR 393. At the diagnostic staffing, the team reviewed and analyzed information collected through assessment and informal information collected by staff serving Child. TR 703-704. At the June 2, 1999 diagnostic staffing meeting, the issue of a language disorder was discussed and the differences between speech and language were discussed again. TR 703-704. Deficits were identified in the areas of reading and math, in addition to speech intelligibility. TR 721. Language skills were considered to be adequate, based on expectations for measured cognitive abilities. Voice and fluency were adequate, but speech was judged as impaired in the area of articulation. Parents and regular teachers reported there were severe intelligibility problems. Child's intelligibility was still of significant concern and he had not received speech services as indicated in his prior IEP. The panel finds there were severe intelligibility problems and speech services, both direct and indirect to Child and his teachers, needed to be intensified. Child's Speech Therapy minutes were reduced form 180 minutes weekly to 90 minutes weekly.

12. An IEP meeting was held on June 2, 1999, directly after the diagnostic staffing. TR 812; Jt. Ex. A5. At the time of the IEP meeting on June 2, 1999, Child had received approximately three weeks of interim speech services from a contract provider.

Child's mother expressed a preference for the interim contract provider rather than a recently hired District employee, who was assigned to Lyon School. Ms. Haaisis provided three weeks of therapy and Mrs. noted improvements during that time. Child's mother did not note the same improvement by the assigned speech therapist, Ms. Zinschlag. The classroom teachers did not note in their testimony a significant change in Child's intelligibility during the time Mrs. Haaisis worked with Child.

13. At the June 2, 1999 IEP meeting, Child's present level of performance and his goals and objectives were discussed, including his goals in the area of speech. TR 813-814. Ms. Zinschlag provided information regarding Child's current level of functioning in speech. TR 815. She documented that he was approximately 25 percent intelligible to the untrained listener. TR 815.

14. The district did not provide all of the speech therapy during the school year of 98-99, due to understaffing of the district. At the June 2, 1999 IEP meeting, Child was offered the opportunity to participate in the District Extended School Year ("ESY") program during the summer of 1999. TR 181; Jt. Ex. A5. Child attended the ESY program, conducted at Shaw VPA for approximately five of the six weeks that it was offered. Child missed the sixth week; due to previously scheduled family plans. Child received speech services and he showed progress. TR 181.

15. Parents and Dr. Burris, the pediatric neurologist, testified the window of opportunity to improve intelligibility is limited to the early elementary years. This was consistent with severe intelligibility problems.

16. Between May 1999 and August 1999, Parents obtained evaluations of Child in the areas of speech and language, and neurology. Parents attempted to deliver a

handwritten summary of the evaluation to the district but they did not share with the District until February 17, 2000. Jt. Ex. B5; Jt. Ex. B8.

17. Parents' due process request was received by DESE on October 7, 1999 alleging denial of FAPE.

18. A meeting was held at the office of Mr. Ramon Morganstern, Parents' attorney, on February 17, 2000. Parents, Ms. Brown, and Ms. Margaret Mooney, attorney for the District, attended this meeting to clarify due process issues. Jt. Ex. G (February 24, 2000.) After several letters from Ms. Mooney, Mr. Morganstern sent a letter dated April 5, 2000, indicating specific areas for which due process was being sought. Jt. Ex. G (April 5, 2000)

19. In the April 5, 2000 letter, Parents requested independent evaluations of Child in the areas of speech and language, occupational therapy (OT), and physical therapy (PT). Jt. Ex. G, April 5, 2000. These evaluations were conducted by specialists at St. Louis Children's Hospital on June 27 and June 29, 2000. Jt. Ex. B1-4. Parentss chose St. Louis Children's Hospital, set up the appointments, and specifically requested the method and means of evaluation for Child. TR 225-227; TR 231-323.

20. Copies of the evaluation reports were not provided to counsel for the District until August 3, 2000. Jt. Ex. B1-4. The St. Louis Children's Hospital June 2000 speech and language evaluation did not specifically diagnose Child with Apraxia, although the recommendation were consistent with methodology used in the treatment of apraxia. Jt. Ex. B1.

21. The District gave Parents three letters signed by the Executive Director of Special Education stating that the District would pay for the Independent Educational Evaluation (IEE). TR 880-881; Jt. Ex. G (May 24, 2000) The District reports not

receiving any bill from the St. Louis Children's Hospital until Child's mother brought the bill for the IEEs to the due process hearing on Tuesday, April 24, 2001. Parents report the invoices being misdirected. TR 821; TR 911; TR 881.

22. The least restrictive environment for Child was discussed at the October 2000 meeting called by the district. TR 467-468; TR 874. The district team members felt that Child was making progress in the general education curriculum, that he should be in a regular classroom where he would have good role models for correct speech, that going to the resource program had helped him keep up with the general education curriculum, that he was making progress and that he was receiving his education in the least restrictive environment. TR 467-468. The district team members indicated that Miriam School would not be an appropriate placement for Child because it is a school for children with disabilities, where he would not be in the least restrictive environment for instruction. TR 468. The district team members also believed that a self-contained classroom would not be appropriate because Child was making adequate progress in the general education curriculum with services and supports in the regular classroom. TR 468. Parents disagreed as to resource placement because of the problems with delivery of service and reduced speech therapy minutes. This meeting continued after Parents and Mr. Morganstern left the meeting. As a result of the breakdown in negotiations, no IEP was developed and no service change occurred.

23. Another IEP meeting was attempted on January 9, 2001. Jt. Ex. A12. The District requested this meeting because Parents had removed Child from the resource room of Ms. Goldie Ray on November 29, 2000, Jt. Ex. A12 at 6, and the District believed that a change in placement had occurred. This meeting was delayed as a result of

the December break. The meeting was originally scheduled for January 4, 2001 but Mr. Morganstern was unable to attend; a new date was set January 9, 2001 to accommodate his schedule. Jt. Ex. A13.

24. Ms. Goldie Ray was the Resource Teacher for Child. At the January 9, 2001 meeting, Child's mother's lawyer presented the District with a letter stating that Parents were removing their son from Ms. Ray's resource room. Jt. Ex. A12 at 6. The District, in an effort to resolve this conflict, offered to assign another resource room teacher to replace Ms. Ray, even though the student teacher ratio did not require an additional resource teacher at Lyon. TR 890. Child utilized this teacher. Ms. reported this teacher sold candy from her room, as observed by other students. The Principal had no knowledge of such an incident. Parents disputed the districts findings. Ms. Ray testified at times she called her students lazy and hardheaded. Ms. Ray also testified that most children do not want to come to my class. TR 433

25. Child's present levels of performance, were discussed at the January 9, 2001 IEP meeting. TR 152; Jt. Ex. A12. Child's Speech and Language Pathologist, Ms. Zinschlag raised the subject of apraxia for the first time to Parentss at this meeting. TR 152; Jt. Ex. A 12. The District had recently held an in-service seminar on apraxia that Ms. Zinschlag attended. TR 152. Ms. Zinschlag noted that Child displayed some symptoms of apraxia. She suggested that he be evaluated for apraxia. TR 152. Child's mother orally agreed to such evaluation at the January 9, 2001 meeting. Jt. Ex. A12.

26. The District began the process of preparing an evaluation plan for Child. Under the IDEA, the District had 30 days to develop an evaluation plan, and to send a Notice of Action to Parents for their written consent to evaluate. A Notice of Action was sent to

Parents in January 2001. Parents sent the District a letter on February 9, 2001 stating that they would not consent to the District evaluating Child for apraxia. Parents had St. Louis Children's Hospital perform a speech evaluation for Child on February 1, 2001. TR 155. Mr. Morganstern informed the District that he had received a copy of the evaluation on Monday, February 12, 2001 but he did not give the District a copy of the report until March 16, 2001.

27. The District staff and independent evaluator have diagnosed a speech disability and motor problems. TR 794-797; TR 649-650. The panel agrees with the diagnosis of learning disability for Child.

28. Child has shown some improvement in speech and other areas that Ms. Zinschlag had continued to address. Ms. Zinschlag testified that it is important that there is speech reinforcement outside his speech classroom. TR 682-683.She has documented her work with Child and has prepared work sheets for drills that he should do at home. Child has improved. Dep. at 68. Parents testified that Child has shown improvement. She stated in her deposition that in October 2000 she could understand Child better than she could 18 months before. Dep. at 68. The greatest improvement noted by Parents was during the time Ms. Haaisis gave three weeks of speech therapy.

29. Dr. Burris, a child neurologist, evaluated Child on August 11, 1999. The report indicated that Child had progressed with respect to speech development. He reported Child did not use his first words until about 3-1/2 years of age and did not say two words together until about 4-1/2 years of age. At the time of evaluation, 6 years 8 months, he was able to use phrases and sentences. Jt. Ex. B5. The child neurologist also stated that Parents felt that Child has improved somewhat through

the years, but remains understandable about 25% of the time to the untrained listener. Jt. Ex. B5. The child neurologist stated the window of the opportunity for intelligibility is when he is young and the window is closing.

30. The evaluations of Child performed by St. Louis Children's Hospital in June 2000 show the following:

    (a) Speech and Language – Voice and fluency were judged as within normal limits. Oral motor structure and function were found to be generally appropriate for speech production. Articulation errors included a lateral lisp (s, z, sh, ch) and sound substitution (w/r). Receptive language skills were considered to be within wide normal limits; expressive language standard scores were considered indicative of a concern in this area. The June 27, 2000 evaluation by Ms. Karin Jackson did not diagnose Child with apraxia nor were there any characteristics or signs of apraxia. TR 235; TR 243.

    (b) Occupational Therapy – All fine and gross motor skills were judged age appropriate with the exception of significantly delayed fine motor writing skills.

    (c) Physical Therapy – Strength, balance, and coordination were measured as decreased based on expectations for age. Jt. Ex. B1-4.

31. Child was evaluated a second time for speech and language by the St. Louis Children's Hospital for apraxia on February 1, 2001. Jt. Ex. B34. Ms. Karin Jackson again was the evaluator. She administered the Kaufman Speech Praxis Test, which indicated that Child had breakdowns in several different areas of the assessment, which related, according to the hierarchy of the test, to dyspraxia of speech. TR 238. She testified that a child with oral motor problems would start a therapy session by "waking up the oral motor structure, doing specific activities relating to oral motors

skills needed to perform that speech sound." TR 241. She recommended that Child needed to start with very simple activities, simple motor plans, simple speech sounds, and move to more complex sounds, words, sentences. TR 241. She recommended that a therapist see Child two or three times a week and do no less than two times a week at 60 minutes each session. TR 242.

32. Mrs. Zinschlag and Ms. Brown testified that the therapy provided before and after diagnosis of Apraxia was consistent with apraxic therapy. They also indicated that therapy should be frequent in short therapy sessions instead of 60 minutes based on age, attention span and other factors. They emphasized the importance of practice and carry over in other circumstances.

33. Dr. Garrett Burris testified that Child would benefit from intensive speech therapy. TR 263-264. Dr. Burris defined intensive as “one-on-one tutorial a number of times per week during which somebody is working with him in terms of speech." TR 264. He also stated the window of opportunity was narrowing and services should not have been reduced.

34. Parents’ witnesses Karin Jackson and Joan Holland testified they were not charging for their testimony. TR 245; TR 169. Dr. Garrett Burris testified that he was charging a flat fee of $250.00. TR 276. Witness Linda Werner testified she would charge Parents $500.00. TR 525.

Parentss’ Issues for Determination

Parents filed for due process on October 7, 1999. Requesting determination of the issue of FAPE in the delivery of speech therapy in the number of minutes provided and the delivery of services. Later, they further requested placement at Miriam School, a special school for disabled children.

Conclusions of Law

A. Substantive Issues

1. Provision of education to special education students such as Child is governed by the reauthorized IDEA, 20 U.S.C. §1401 et seq., and the regulations promulgated pursuant to the IDEA, 34 C.F.R. Parts 300 and 303. The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education." Jasa v. Millard Pub. Sch. Dist., 206 F.3d 813,815 (8th Cir. 2000) (quoting 20 U.S.C. § 1400(d)(1)(A)).

2. A school district complies with the IDEA and provides Free and Appropriate Public Education ("FAPE") when it (1) appropriately classifies a student's educational disability, (2) develops an IEP that provides educational benefit, (3) places the student appropriately based on IEP requirements, (4) affords suitable opportunities for inclusion, and (5) follows procedures that allow the student (when appropriate) and Parents to participate in the IEP process. Warner v. Independent Sch. Dist. No. 625, 134 F.3d 1333, 1336-37 (8th Cir. 1998).

3. The purpose of the IDEA and its regulations is (1) "to ensure all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs," (2) "to ensure that the rights of children with disabilities and their Parents are protected," (3) "to assess and ensure the effectiveness of efforts to educate those children." 34 C.F.R. § 300.1 (1999). If Parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 33.507; Thompson v. Board of the Special Sch. Dist. No. 1, 144 F.3d 574, 578 (8th Cir.

1998); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997); Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1469 (9th Cir. 1993).

4. The IDEA is designed to enable children with disabilities to have access to a FAPE, which is designed to meet their particular needs. O'Toole v. Olathe Dist. Sch. Unified Sch. Dist., 144 F.3d 692, 698 (10th Cir. 1998). The IDEA and the Missouri State Plan require the school district to provide a child with disabilities with a "basic floor of opportunity…which [is] individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

5. In so doing the IDEA does not require that the school district either maximize a student's potential or provide the best possible education at public expense. Rowley, 458 U.S. at 199; O'Toole, 144 F.3d at 698; Heather S. v. State of Wisconsin, 125 F.3d 1045, 1054 (7th Cir. 1997); Fort Zumwalt, 119 F.3d at 612; Johnson v. Independent Sch. Dist., 921 F.2d 1022, 1026 (10th Cir. 1990); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, a school district is not required to provide a program that will, "achieve outstanding results," E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998); that is "absolutely [the] best," Tucker v. Calloway County Bd. of Educ., 136 F.3d 495, 505 (6th Cir. 1998); that will provide "superior results," Fort Zumwalt, 119 F.3d at 613; or that will provide the placement the Parents prefer. Blackmon v. School Dist. of Springfield, R-12, 198 F.3d 648 (8th Cir. 1999) (citing E.S., 135 F.3d at 569). This is true even if "Parents show that a child [will make] better progress in a different program." O'Toole, 144 F.3d at 708.

6. Under Missouri law, an IEP is not required to maximize the educational benefit to the child or to provide each and every service and accommodation that could conceivably be of some educational benefit. Rowley, 458 U.S. at 199; Blackmon, 198

F.3d 658; Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1035 (8th Cir. 2000). Although an educational benefit must be more than de minimis to be appropriate, Doe v. Board of Educ. of Tullahoma City Schls., 9 F.3d 455, 459 (6th Cir. 1993).

7. Although states are free to adopt a higher FAPE standard than that required by the IDEA, Missouri has not done so. Courts uniformly have held that the FAPE standard in Missouri is that stated in Rowley, and have specifically rejected the notion advanced by some that Missouri has adopted a maximization standard. See, e.g., Fort Zumwalt, 119 F.3d 607, 612 (IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense); Gill, 217 F.3d at 1035. (IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense); Carl D. v. Special Sch. Dist., 21 F. Supp. 1042, 1047 (E.D. Mo. 1998) (rejecting maximization standard and holding that the law in this Circuit is clear. A school district meets the statutory obligation to provide a free appropriate public education by providing educational benefit. The [IDEA] does not require the school district to provide the best possible education).

8. An appropriate educational program is one, which is reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 207. In articulating the standard for FAPE, the Rowley Court concluded that Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful. Id. at 192.

9. At the administrative hearing level, the school district has the burden of proving that it has complied with the IDEA, Blackmon, 198 F.3d at 658 (citing E.S., 135 F.3d at 569), and that the educational program and placement are appropriate. Burger v.

Murray County Sch. Dist., 612 F.Supp. 434, 437 (N.D.Ga. 1984). In this case the panel finds the district has failed to comply

10. The primary vehicle for carrying out the IDEA's goals is the individualized education program ("IEP"). 34 C.F.R. § 300.13(d) (1999). The IEP is a written statement that is developed to meet the unique needs of each disabled child, and it is prepared at a meeting that includes representatives of the local educational agency, the child's current teacher(s), the Parents or guardian of the child, and, whenever appropriate, the child. 34 C.F.R. §§ 300.340-347 (1999).

11. Each IEP must contain a statement of the child's present level of performance, annual goals, short-term instructional objectives, a description of the placement and the reason for its selection, dates for the duration of the program, and objective criteria by which achievement of the objectives can be evaluated. 34 C.F.R. § 300.347 (1999).

12. A child's IEP may also include related services, such as physical therapy and occupational therapy, which are required for the child to benefit from the special education services included in the IEP. 34 C.F.R. § 300.13 (1999).

13. The IDEA requires that each IEP must be reviewed at least annually and, where appropriate, revised. 34 C.F.R. § 300.343(c)(1) (1999).

14. For an IEP to be valid the procedural safeguards established by the IDEA must be followed and the IEP must be substantively appropriate. Evans v. District No. 17, 841 F.2d 824, 828 (8th Cir. 1988). In this case a few of the safeguards were not followed.

15. As long as the IEP is reasonably calculated to benefit and does benefit the disabled child, IDEA will not compel schools to follow Parent's preferences for a specific teaching methodology, maximize their resources or the student's potential by following these preferences, or displace the school's judgment in favor of these preferences.

Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982); Gill, 217 F.3d at 1035-1036. Competing opinions and Parents' preferences should be considered during the formulation of an IEP and its evaluation by an administrative panel, but a court should not intervene in these questions of education policy so long as it finds that a school district has offered a program of specialized services reasonably calculated to enable a child to receive educational benefit. Gill, 217 F.3d at 1037.

16. The IDEA entitles Parents who believe that their disabled child would benefit from a particular type of therapy to present their views at meetings of their child's IEP team, to bring experts in support to the meetings, and to seek administrative review, but it does not empower Parents to make unilateral decisions about programs funded by public monies. Id.

17. Although the IDEA mandates individualized appropriate education for disabled children, it does not require a school district to provide a child with the specific educational placement that Parents prefer, nor does the IDEA require a school district to either maximize a student's potential or provide the best possible education at public expense. Blackmon, 198 F.3d at 658 (citing Fort Zumwalt, 119 F.3d at 612). The purpose of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Id. (quoting Rowley, 458 U.S. at 192).

18. The educational program offered by the district is appropriate if it is “reasonably calculated to enable the child to benefit educationally.” Peterson v. Hastings Pub. Sch., 31 F.3d 705, 707 (8th Cir. 1994); Rowley, 458 U.S. at 206-207.

19. In assessing whether educational benefit has occurred, a child's grades, test scores and advancement from grade to grade are important factors to consider. Fort Zumwalt, 119 F.3d at 607 (citing 20 U.S.C. § 1412(1) (1997)).

20. As long as a student is benefiting from his education, the selection of methodology is left to the educators. E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566 (8th Cir. 1998). The results need not be superior. Rowley, 458 U.S. at 199.

21. The panel finds that educational benefit was being delivered to Child in the regular classroom, OT and PT services. FAPE was not delivered in the area of speech therapy and lack of appropriate communication and therefore scheduling. The resource room service must be evaluated by the District to determine who can deliver the proper service to Child. In addition, a careful evaluation of the time away from regular classroom needs to be completed to avoid missing other general education curriculum.

22. Child has shown improvement in speech. Parents testified that Child has shown improvement. She stated in her deposition that in October 2000 she could understand Child better than she could 18 months before. Dep. at 68. Ms. Zinschlag testified that Child is improving in speech intelligibility. TR 647. She testified that she can understand Child 90% of the time including gestures and other cues. TR 647; TR 653 Ms. Zinschlag further testified that she believes that with the appropriate amount of intensity of speech therapy that Child will be able to function on his own. TR 653-654. Ms. K. Jackson, Parents' expert and independent examiner testified that Child's speech intelligibility improved from June 2000 to February 2001. TR 245.

23.The District failed to, due to understaffing, to provide FAPE to Child: (1) during the 1998-99 school year; the amount of Speech Therapy provided Child was not in compliance with the IEP; (2) at the 2/10/99 IEP Speech services were reduced from 180

minutes weekly to 90 minutes weekly without a Speech Pathologist directly familiar with him and despite the evidence that his speech was of significant concern to his teachers and parents; no other direct or indirect Speech services added to his 2/10/99 IEP; and (3) poor communication between regular and resource special education staff created inappropriate scheduling of resource time and did not allow for appropriate access to the general curriculum, as demonstrated during his second grade year specifically in the area of math.

B. Procedural Issues

24. The standard for FAPE found in the Supreme Court's decision in Board of Education v. Rowley, 458 U.S. 176 (1982), is a two part test: (1) Has the state complied with the procedures set forth in the Act; and (2) Is the Individualized Education Program developed through the Act's procedures reasonably calculated to enable a child to receive educational benefit?

25.The IDEA establishes a comprehensive system of procedural safeguards designed to ensure Parents participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those Parents disagree. Honig v. Doe, 484 U.S. 305, 308 (1988).

26.Recognizing that a consensus regarding a child's proper placement and IEP would not always be possible, Congress provided for administrative review of an IEP determination at the request of either the Parents or guardian or the local educational agency and, after exhaustion of the administrative review process, judicial review in a state or federal court. If Parents disagree with the IEP, or proposed changes to the IEP, the state must provide them with an impartial due process hearing. 20 U.S.C.

1415(b)(6) (1999). This panel heard the evidence on April 17, 18, 19, and 24, 2001. Respondent has failed to provide Child with FAPE consistently since his May 1998 IEP. The failure to provide FAPE as a result of the actions of Ms. Elaine Dorsey, Child's speech and language provider, in the Fall 1998 has been partially compensated by provision of additional speech therapy minutes since Spring 1999, however, valuable time was lost in improving speech intelligibility which proper staffing and proper delivery of service may have rectified.

27.The Eighth Circuit Court of Appeals has adopted what amounts to a harmless error standard by which to review claimed procedural deficiencies in the formulation of an IEP, by holding that an "IEP should be set aside only if 'procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered Parentss' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'" Independent Sch. Dist. v. S.D., 88 F.3d 556, 562 (8th Cir. 1996); see also Blackmon, 198 F.3d at 656. Technical defects are not sufficient to render an IEP inappropriate if Parents and the school district are aware of the relevant information. Independent Sch. Dist., 88 F.3d at 562.[2]

28.The diagnostic team changed Child's diagnosis from language impaired to learning disabled in June 21, 1999 after their evaluations were conducted.[3] No procedural violations occurred in connection with the change in diagnosis, however, this did not purge the FAPE violation in the reduction of speech services.

C. Least Restrictive Environment

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[3] At the February 10, 1999 IEP team meeting, the IEP team determined that additional information was needed in the areas of speech (voice), cognitive, and motor. Child was evaluated in these areas and a diagnostic team met on June 2, 1999. The

29.The IDEA requires that a child with disabilities be placed in the least restrictive environment that will provide him with meaningful educational benefit. The "least restrictive environment" is the one that, to the greatest extent possible, satisfactorily educates disabled children, together with children who are not disabled, in the same school the disabled child attended if the child were not disabled. T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 578 (3rd Cir. 2000).

30.Under the IDEA, there is a strong preference in favor of mainstreaming. Board of Educ. v. Illinois State Bd. of Educ., 184 F.3d 912, 915 (7th Cir. 1999). In addition to the statutory presumption, IDEA's implementing regulations provide that disabled children are to be educated in the least restrictive environment. 34 C.F.R. §300.550(b)(1) (1999). The regulations provide that a child may be removed from a regular educational environment only when the nature or severity of that child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.550(b)(2) (1999).

31.Missouri has enacted analogous legislation addressing mainstreaming. The Missouri statute provides:

> To the maximum extent practicable, disabled and severely disabled children shall be educated along with children who do not have disabilities and shall attend regular classes . . . Impediments to learning and to the normal functioning of such children in the regular school environment shall be overcome whenever practicable by the provision of special aids for services rather than by separate schooling for the disabled.

Mo. Rev. Stat. § 162.680.2 (2000). This statutory framework reveals the strong congressional preference for mainstreaming. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 162 (8th Cir. 1987).

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change from language impaired to learning disabled, was a broader diagnosis that encompassed speech and oral-motor problems.

32. A court may consider both cost to the local school district and benefit to the child in making its determination of compliance with the IDEA. Id. at 163. Actions for monetary damages are not available under the IDEA. Hoekstra v. Independent Sch. Dist. No. 283, 103 F.3d 624, 625 (8th Cir. 1996).

33.The IDEA does not allow Parents to control and/or dictate the times and means of providing the services under the IEP. Equitable considerations are relevant in fashioning appropriate relief under the IDEA. Moubry v. Independent Sch. Dist. No. 696, 951 F.Supp. 867, 884 (D.Minn. 1996). Appropriate relief is designed to ensure the student is properly educated within the meaning of the IDEA. Id.

34. The panel believes that with appropriate special education support services a regular education school is the most appropriate placement for Child. It is a public magnet school where he is in a regular education classroom and has the opportunity on a daily basis to interact with non-disabled peers. His three sisters attended Lyon School and his mother works at the school. Child's mother testified that his second grade teacher is an outstanding and competent teacher. TR 158-159. Moreover, both his kindergarten teacher, Ms. Carmen, and his second grade teacher, Ms. Olander, testified that Child benefits from the regular education classroom. TR 330; TR 563.

35.Miriam school is not the least restrictive placement for Child because his disabilities are not so severe that they cannot be addressed in a regular school setting. Miriam School is not the school that Child would otherwise attend if he were non-disabled. TR 160-161; TR 164. All students at Miriam are designated with a category of disability; there are no non-disabled children. TR 161-162. Presently, Miriam has 90 students. TR 161. Miriam presently does not have any children under contract with the District. TR 164. The tuition at Miriam is $15,795 per year. TR 168.

D. Attorney's Fees

35. Petitioner and Respondent may brief the issue of attorney's fees for a partially favorable decision.

Conclusion

The intent of IDEA 1997 is to insure the special educational services provided in a manner that does not affect the child's ability to be involved in and progress in general education. (CFR 300.347(a)(2))

The Panel finds the Least Restrictive Environment to be a regular education school with supplemental aides and services. The panel directs the St. Louis Public Schools to convene an IEP team for Child to meet and develop an appropriate IEP to address all educational concerns with a program designed to address his special education and regular education needs in a regular education building with supplemental aids and services. The IEP team is directed to establish meaningful minutes of Speech Therapy suitable for Child's specific speech needs. The IEP team is to instruct the regular classroom teacher, resource teacher, if any, and where appropriate, any other providers of service, on the proper method of Speech Therapy for Child to improve his intelligibility. Special attention will be given to address specific speech needs related to apraxia. Also, to address all educational concerns including a program designed to address his special education and regular education needs in a regular education building with supplemental aids and services. The panel further orders oversight, by a neutral third party (such as a mediator) to be agreed upon by the District and Parents to assist in the development of the IEP and monitor the provision of services. This placement will be modified in the event the district would

again fail to provide services as set forth in the IEP. The third party will make a determination with Parents and the district as to the modification including consideration for contractual services (such as speech and language therapy) or other service alternatives that offer the LRE and full provision of all services. The district will see that services to Child are not interrupted and will contract for services if they are not available within the district.

The third party will mediate all disputes in the event Parents and the District cannot agree. The District will compensate the third party for reasonable time at a reasonable rate, for the implementation of the IEP as herein set out. In the event the parties cannot agree on a mediator, the Panel will select a mediator.

It is the panel's belief that poor communication and poor planning caused certain procedural violations and the District should review CFR 300.345 and 300.501.

SO ORDERED: _____

_____
C.E. "SKETCH" RENDLEN, III
CHIEF HEARING OFFICER

_____
BETH MOLLENKAMP
HEARING PANEL MEMBER

_____
SUE DAME
HEARING PANEL MEMBER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was delivered by U.S. Mail this ___ day of August 2001, to:

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